(22,936)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 128.

JOSEPH PRONOVOST, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 17, 1913.

1 *Names and Addresses of Attorneys of Record.*

James W. Freeman, Esq., United States Attorney, Helena, Montana, Attorney for Plaintiff and Defendant in Error.
F. D. Lingenfelter, Esq., and M. D. Baldwin, Esq., Kalispell, Montana, Attorneys for Defendant and Plaintiff in Error.

2 In the District Court of the United States, in and for the District of Montana.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
JOSEPH PRONOVOST, Defendant.

Caption.

Be it remembered, that on the 17th day of May, A. D. 1911, an indictment was presented and filed herein, being in the words and figures following, to wit:

3 UNITED STATES OF AMERICA,
District of Montana, ss:

In the District Court of the United States, Within and for the District of Montana, of the Term of April, in the Year of our Lord, One Thousand Nine Hundred and Eleven.

The grand jurors of the United States of America, duly impaneled, sworn and charged to inquire within and for the district of Montana, and true presentment make of all crimes and misdemeanors committed against the laws of the United States, within the state and district of Montana, upon their oaths and affirmations do find, charge and present:

That one Joseph Pronovost, late of the state and district of Montana, on the 2nd day of January, A. D. 1911, at and within the state and district of Montana, did then and there wrongfully, unlawfully and feloniously introduce a large quantity of spirituous and intoxicating liquors, commonly called whiskey, in quantity about one hundred eighty-eight quarts, the exact quantity of which is to the grand jurors aforesaid unknown, into the Flathead Indian Reservation, within the state and district of Montana, the said Flathead Indian Reservation then and there being an Indian country, under the charge of Fred C. Morgan, then and there the Superintendent and Special Disbursing Agent in charge of the said Flathead Indian Reservation; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Second Count.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That the said Joseph Pronovost, late of the state and district of Montana, on the 2nd day of January, A. D. 1911, at and within the state and district of Montana, did then and there wrongfully, unlawfully and feloniously introduce a large quantity of spirituous and intoxicating liquors, commonly called wine, in quantity
4 about four quarts, the exact quantity of which is to the grand jurors aforesaid unknown, into the Flathead Indian Reservation, within the state and district of Montana, the said Flathead Indian Reservation then and there being an Indian country, under the charge of Fred C. Morgan, then and there the Superintendent and Special Disbursing Agent in charge of the said Flathead Indian Reservation; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Third Count.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That the said Joseph Pronovost, late of the state and district of Montana, on the 2nd day of January, A. D. 1911, at and within the state and district of Montana, did then and there wrongfully, unlawfully and feloniously introduce a large quantity of malt and intoxicating liquors, commonly called beer, in quantity about three quarts, the exact quantity of which is to the grand jurors aforesaid unknown, into the Flathead Indian Reservation, within the state and district of Montana, the said Flathead Indian reservation then and there being an Indian country, under the charge of Fred C. Morgan, then and there the Superintendent and Special Disbursing Agent in charge of the said Flathead Indian Reservation; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

JAS. W. FREEMAN,
United States Attorney, District of Montana.

5 (Indorsed:) No. 1749. United States District Court, District of Montana. United States of America vs. Joseph Pronovost. Indictment, a True Bill. Jno. E. O'Connor, Foreman of Grand Jury. Jas. W. Freeman, United States Attorney, District of Montana. Witnesses: Willis M. Gillett, Sam Piere, H. L. Butler, Fred C. Morgan, Frank C. Bailey, Margaret O'Brien, Miss O'Brien. Bond fixed at $1,000, Carl Rasch, Judge. Presented by the grand jury in open court, by their foreman, in their presence, and filed this 17th day of May, A. D. 1911. Geo. W. Sproule, Clerk.

6 And thereafter, to wit, on July 14, 1911, the defendant was duly arraigned and entered a plea of not guilty, and said cause came on for trial, the record of said proceedings being in the words and figures following, to wit:

In the District Court of the United States, in and for the District of Montana.

79th Day, April Term, 1911, Friday, July 14, 1911.

In Open Court.

No. 1749.

UNITED STATES OF AMERICA
vs.
JOSEPH PRONOVOST.

The United States Attorney and defendant with his attorney, F. D. Lingenfelter, Esq., present in court, and being arraigned defendant answered that his true name is Joseph Pronovost; and thereupon defendant waived the reading of the indictment and time to plead and pleaded that he is not guilty and plea of not guilty entered; and thereupon, the parties being ready for trial, the following named persons were regularly impaneled, accepted and sworn as a jury to try said cause, viz: A. I. Wahlgren, George Douglas, J. L. Piersky, S. L. Smithers, Joe Spursem, H. S. Thurber, H. Richter, C. E. Dutton, H. C. Barth, J. W. Owens, W. C. Riddle and C. A. Blaise; and thereupon Fred C. Morgan was sworn and examined as a witness for the United States, and thereupon the United States rested; and thereupon defendant moved the court to direct a verdict in favor of the defendant and to dismiss the indictment herein for lack
7 of jurisdiction of the offense charged in the indictment, upon the plaintiff's proof, and thereupon, after due consideration, motion denied and exception of defendant noted; and thereupon, defendant having no proof to offer, evidence was closed and cause submitted without argument; and thereupon, after hearing the instructions of the court, the jury retired to consider of their verdict, and subsequently having agreed upon a verdict the jury was returned into court and being called, all answered to their names as present, defendant and respective counsel being present as before; and thereupon the verdict of the jury as rendered was duly filed and ordered entered, being in the words and figures following, to wit:

"We, the jury in the above entitled cause, find the defendant guilty in manner and form as charged in the indictment.

JOE SPURSEM, *Foreman.*"

And thereupon defendant moved the court in arrest of judgment herein, for lack of jurisdiction; and thereupon, after due consideration, motion overruled and exception of defendant noted.

And thereupon defendant gave notice of appeal herein, and bond of defendant ordered fixed in the sum of $2,000.00.

And thereupon defendant waived time for sentence.

Entered, in open court, July 14, 1911.

GEO. W. SPROULE, *Clerk.*

Attest a true copy of minute entry:

[SEAL.] GEO. W. SPROULE, Clerk.

By C. R. GARLOW, *Deputy.*

8 And thereafter, to wit, on July 14, 1911, the Verdict of the jury was duly filed and entered herein, being in the words and figures following, to wit:

9 In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA, Plaintiff,

vs.

JOE PRONOVOST, Defendant.

Verdict.

We, the jury in the above entitled cause, find the defendant guilty in manner and form as charged in the indictment.

JOE SPURZEM, *Foreman.*

Indorsed: Title of Court and Cause. Verdict. Filed and Entered July 14, 1911. Geo. W. Sproule, Clerk.

10 And thereafter, to wit, on July 14, 1911, Judgment was duly rendered and entered herein, being in the words and figures following, to wit:

11 In the District Court of the United States, District of Montana.

No. 1749.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

JOSEPH PRONOVOST, Defendant.

Judgment.

The United States Attorney with the defendant and his counsel present in court.

The defendant was duly informed by the court of the nature of the charge against him, for the offense of wrongfully, unlawfully

and feloniously introducing spirituous and intoxicating liquors into the Flathead Indian Reservation, in the State and District of Montana, committed on the 2nd day of January, A. D. 1911, as charged in the indictment herein; and of his indictment, arraignment and plea of not guilty, and of his trial and the verdict of the jury of guilty as charged.

And the defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which he replied that he had none, and no sufficient cause being shown or appearing to the court, thereupon the court rendered its judgment as follows, to wit:

That whereas, the said defendant having been duly convicted in this court of the offense of wrongfully, unlawfully and feloniously introducing spirituous and intoxicating liquors into the Flathead Indian Reservation, in the State and District of Montana, committed on the 2nd day of January, 1911, as charged in the indictment herein;

It is therefore considered, ordered and adjudged that for said offense you, the said Joseph Pronovost, be confined and imprisoned in the Lewis and Clark County jail at Helena, Montana, for
12 the term of ninety days, and that you pay a fine of Two Hundred Dollars, and be confined in said county jail until said fine is paid or you are legally discharged according to law.

Judgment rendered and entered this 14th day of July, 1911.

GEO. W. SPROULE, *Clerk.*

Attest, a true copy of Judgment:

[SEAL.] GEO. W. SPROULE, *Clerk,*
By C. R. GARLOW, *Deputy Clerk.*

UNITED STATES OF AMERICA,
District of Montana, ss:

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify that the foregoing papers hereto annexed constitute the judgment roll in the above entitled action.

Witness my hand and the seal of said Court at Helena, Montana, this 14th day of July, A. D. 1911.

[SEAL.] GEO. W. SPROULE, *Clerk,*
By C. R. GARLOW, *Deputy Clerk.*

Indorsed: Title of Court and Cause. Judgment Roll. Filed July 14, 1911. Geo. W. Sproule, Clerk, by C. R. Garlow, Deputy.

13 And thereafter, on October 2nd, 1911, defendant filed his Bill of Exceptions herein, which was duly settled and allowed and ordered filed nunc pro tunc as of July 14, 1911, said Bill of Exceptions and Order allowing same being in the words and figures following, to wit:

In the District Court of the United States in and for the District of Montana.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
JOSEPH PRONOVOST, Defendant.

Bill of Exceptions.

Bt it remembered, that heretofore, to wit, on the 14th day of July, 1911, being a day of April Term, 1911, of said District Court, the above entitled cause came on regularly for trial before the United States District Court for the District of Montana, the Honorable Carl Rasch, the Judge thereof, presiding, James W. Freeman, Esq., United States Attorney, appearing as attorney for the plaintiff, and F. D. Lingenfelter, Esq., appearing as attorney for the defendant, a jury of twelve persons was duly and regularly impaneled to try said cause. Whereupon the following proceedings were had, to wit:

That thereupon plaintiff introduced evidence in support
14 of the charges contained in said indictment and the defendant admitted through his counsel, F. D. Lingenfelter, Esq., that he introduced and had the liquors in his possession as charged in the indictment, and that the plaintiff consented that the three counts be considered as one act.

That thereafter the defendant moved the court to instruct the jury to bring in a verdict for the defendant and to dismiss the indictment upon the ground and for the reason that the townsite of Polson and the town of Polson is an incorporated city under the laws of the State of Montana, and is subject to the police power of the State of Montana, and that the United States was and is without jurisdiction over the subject matter or over the person of the defendant in this matter.

That said motion was overruled and an exception duly noted and granted. That thereafter the jury returned their verdict wherein and whereby they found the defendant guilty in the manner and form charged in said indictment.

That thereafter the said defendant moved the court in arrest of judgment herein for lack of jurisdiction, and thereupon after due consideration, the said motion was overruled and the exception of defendant granted and noted.

That thereafter the said defendant waived the time as required by law for the passing of sentence, and that thereafter the court pronounced sentence upon the said defendant.

And now therefore, in furtherance of justice and that right may be done, the defendant presents the foregoing as and for his bill of exceptions in this cause and prays that the same may be settled and allowed and signed and certified by the Judge of the above entitled court, who tried said cause as provided by law.

M. D. BALDWIN, AND
F. D. LINGENFELTER,
Att'y for Def't.

15 Service of the foregoing acknowledged and a true copy received July 22, 1911.

J. W. FREEMAN,
U. S. Attorney.

In the District Court of the United States in and for the District of Montana.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
JOSEPH PRONOVOST, Defendant.

Order Settling and Allowing Bill of Exceptions.

This cause coming on regularly before the court on this 2nd day of October, 1911, being a day of the April Term, 1911, of said District Court, upon the application of the defendant for the settling and allowance of his proposed bill of exceptions herein, heretofore duly and regularly served and presented for settlement within the time allowed by law and the rules of the court, and the plaintiff by its attorney having waived in open court its right to propose amendments thereto, and having consented that the same may be now settled and allowed,

It is now ordered that the foregoing bill of exceptions be and is hereby settled and allowed as a true bill of exceptions in this cause, and the same is now hereby certified accordingly by the undersigned, the presiding Judge of said Court, who tried said cause, and it is ordered that the same be filed nunc pro tunc as of July 14, 1911, and made a part of the record herein.

CARL RASCH,
United States District Judge.

16 *Admission of Service of the Bill of Exceptions, etc.*

Due and personal service of the within bill of exceptions made and admitted and receipt of copy acknowledged this 22nd day of July, A. D., 1911, and it is hereby stipulated that said bill of exceptions is true and correct and that the same may be signed and settled as defendant's bill of exceptions to the rulings in said bill referred to.

J. W. FREEMAN,
United States Attorney and Attorney of Record.

Indorsed: Title of court and cause. Bill of Exceptions. Filed and entered nunc pro tunc as of July 14, 1911, Oct. 2, 1911. Geo. W. Sproule, Clerk.

17 That on the 1st day of August, 1911, defendant filed his Assignment of Errors herein, being in the words and figures following, to wit:

In the District Court of the United States in and for the District of Montana.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
JOSEPH PRONOVOST, Defendant.

Assignment of Errors.

Comes now Joseph Pronovost, the defendant in the above entitled cause, and files the following assignment of errors upon which he will rely upon the prosecution of a Writ of Error to have reviewed a judgment made and entered in said cause by the above entitled District Court on the 14th day of July, A. D. 1911, wherein and whereby the said Court sentenced the said defendant to imprisonment in the county jail of Lewis and Clerk county, for the period of ninety days and for the payment of a fine of Two Hundred Dollars ($200.00), and assigns that in the record and proceedings in the above entitled cause, there is manifest error in this, to wit:

One.

That the court erred in failing to instruct the jury to bring
18 in a verdict of not guilty on the ground that the District Court of the United States of America was and is without jurisdiction to hear, try and determine the said cause.

Two.

That the indictment is not founded upon the law and that the said indictment did not state facts sufficient to constitute a public offense.

Three.

That the court erred in instructing the jury that the town of Polson is in the Indian country and is a part and portion of Flathead Indian Reservation.

Four.

That it is a question of law and not of fact as to whether the town of Polson is within the Flathead Indian Reservation as contemplated by the Acts of Congress.

Five.

That the court erred in overruling the motion in arrest of judgment.

Wherefore, the defendant prays that the judgment of said court be reversed.

M. D. BALDWIN AND
F. D. LINGENFELTER,
Attorneys for Defendant.

Service of foregoing acknowledged and true copy received July 22, 1911.

J. W. FREEMANN,
U. S. Att'y.

Indorsed: Title of Court and Cause. Assignment of Errors. Filed Aug. 1, 1911, Geo. W. Sproule, Clerk.

19 And thereafter, to wit, on August 1, 1911, defendant filed his petition for writ of error herein, which said petition is in the words and figures following, to wit:

In the District Court of the United States in and for the District of Montana.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
JOSEPH PRONOVOST, Defendant.

Petition for Writ of Error.

Joseph Pronovost, the defendant in the above entitled cause, feeling himself aggrieved by the judgment made and entered in the said District Court in said cause on the 14th day of July, A. D. 1911, and complaining that in the record and proceedings had in said cause, and also in the rendition of said judgment, manifest error hath happened to the great damage of said defendant, comes now and petitions the above entitled court for an order allowing said defendant to prosecute a writ of error to the United States Supreme Court under and according to the laws of the United States in that behalf made and provided, and also that an order may be made fixing the amount of security which said defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court shall be suspended and stayed until the determination of said writ of error by said United States Supreme Court and until such other and further order as to the court may seem just.

F. D. LINGENFELTER AND
M. D. BALDWIN,
Attorneys for Defendant.

20 Service of the foregoing acknowledged and true copy received July 22, 1911.

J. W. FREEMAN,
U. S. Att'y.

Indorsed: Title of court and cause. Petition for writ of error. Filed Aug. 1, 1911. Geo. W. Sproule, Clerk.

21 And thereafter, on October 2, 1911, an Order Allowing Writ of Error was duly made and entered herein, being in the words and figures following, to wit:

In the District Court of the United States in and for the District of Montana.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
JOSEPH PRONOVOST, Defendant.

Order Allowing Writ of Error.

At a stated term, to wit, the April Term, 1911, of the District Court of the United States in and for the District of Montana, held at the city of Helena, in said District and State of Montana, on the 2nd day of October, A. D. 1911;

Present: The Honorable Carl Rasch, District Judge:

Upon motion of F. D. Lingenfelter, Esq., attorney for defendant, and upon filing a petition for writ of error and assignment of errors,

It is ordered that a writ of error be and hereby is allowed to have reviewed in the United States *District* Court the judgment heretofore entered herein on the 14th day of July, A. D. 1911, and that
22 the amount of the bond on said writ of error be and hereby is fixed at Two Thousand Dollars ($2,000.00), and that upon said defendant, Joseph Pronovost, plaintiff in error, filing with the Clerk of this Court a good and sufficient bond in said sum of Two Thousand Dollars ($2,000.00), approved by this Court or this Judge, execution on said judgment be stayed and all further proceedings in this court be and they are hereby suspended and stayed until the determination of said writ of error by the said United States Supreme Court.

Dated this 2nd day of October, A. D. 1911.

CARL RASCH,
United States District Judge for the District of Montana.

Indorsed: Title of Court and Cause. Order Allowing Writ of Error. Filed and Entered Oct. 2, 1911. Geo. W. Sproule, Clerk.

23 And thereafter, on October 2, 1911, a Bond on Writ of Error was duly filed herein, being in the words and figures following, to wit:

In the District Court of the United States in and for the District of Montana.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
JOSEPH PRONOVOST, Defendant.

Bond on Writ of Error.

Know all men by these presents, that Joseph Pronovost, as principal, and Fred Whiteside and F. W. Porter, as sureties, are held and firmly bound unto the United States of America above named, in the sum of Two Thousand Dollars ($2,000.00) to be paid to the United States of America, for the payment of which well and truly to be made the said principal and sureties bind themselves, their executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Duly executed and dated this 20th day of July, A. D. 1911.

The condition of the foregoing obligation is such that, whereas, the above bounden defendant, Joseph Pronovost, has sued without,
or is about to sue without a writ of error to the United States
24 Supreme Court, to reverse the judgment in the above entitled cause by said District Court:

Now, therefore, the condition of the above obligation is such that if the said Joseph Pronovost, defendant in said cause and plaintiff in error, shall appear either in person or by attorney in the United States Supreme Court on such day or days as may be appointed for the hearing of said cause, and prosecute his said writ of error to effect and if he fails to make his plea good, shall answer all damages and costs, and shall abide by and obey all orders made by said United States District Court in said cause, and shall surrender himself in execution of the judgment and sentence sought to be reviewed, as said United States District Court may direct, if the judgment and sentence against him shall be affirmed, then the above obligation to be void; otherwise to remain in full force and effect.

JOSEPH PRONOVOST,
Principal.
FRED WHITESIDE AND
F. W. PORTER, *Sureties.*

UNITED STATES OF AMERICA,
District of Montana,
State of Montana, County of Flathead, ss:

Fred Whiteside and F. W. Porter being duly sworn, each for himself, says that he is a resident of said county and state, is a resident and freeholder therein, and is worth double the amount stated in the within undertaking, in property in the said State, over and
above all his debts and liabilities, and exclusive of property
25 exempt by law from execution in the State of Montana.

FRED WHITESIDE.
F. W. PORTER.

Subscribed and sworn to before me this 20th day of July, A. D. 1911.

[SEAL.] HOWARD SANFORD,
United States Commissioner.

The foregoing bond is approved as to form and sufficiency this 2nd day of October, A. D. 1911.

CARL RASCH,
United States District Judge for the District of Montana.

Indorsed: Title of Court and Cause. Bond on Writ of Error. Filed Oct. 2, 1911. Geo. W. Sproule, Clerk.

And thereafter, on October 2nd, 1911, a Writ of Error was duly issued herein, which is hereto annexed and is in the words and figures following, to wit:

In the District Court of the United States in and for the District of Montana.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
JOSEPH PRONOVOST, Defendant.

Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable, the District Court of the United States for the District of Montana, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in said District Court before you, between the United States of America, Defendant in error and Plaintiff in the court below, and Joseph Pronovost, Plaintiff in error and Defendant in said District Court, manifest error hath happened to the great damage of said defendant and plaintiff in error, Joseph Pronovost, as by his petition and assignment of errors appears, we being willing that error, if any there hath been, should be duly corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then under your seal distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the United States District Court, together with this Writ, so that you have the same at the City of Washington, in the District of Columbia, within thirty days from the date of this Writ, in the said United States District Court, to have and there held, that the record and proceedings aforesaid be inspected, that the United States District Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglas White, Chief Justice of the United States and the Seal of the U. S. Circuit Court for the District of Montana this 2" day of October, A. D. 1911.

[Seal United States Circuit Court District of Montana, 1890.]

GEO. W. SPROULE,
Clerk of the United States Circuit Court for the District of Montana.

Due and personal service of the foregoing Writ of Error made and admitted and receipt of copy acknowledged this 2nd day of Oct., 1911.

JOS. W. FREEMAN,
United States Attorney for the District of Montana.

29 *Answer of Court to Writ of Error.*

The Answer of the Honorable, the Judge of the United States District Court for the District of Montana, to the foregoing Writ.

The record and all proceedings whereof mention is within made, with all things touching the same, I hereby certify, under the seal of said Court, to the Honorable, the Supreme Court of the United States, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within I am commanded.

By the Court.

[Seal United States District Court District of Montana, 1890.]

GEO. W. SPROULE, *Clerk.*

30 [Endorsed:] Original. In the District Court of the United States in and For the District of Montana. The United States of America, Plaintiff, vs. Joseph Pronovost, Defendant. Writ of Error. M. D. Baldwin and F. D. Lingenfelter, Attorneys for Defendant. Filed Oct. 2, 1911. Geo. W. Sproule, Clerk.

31 And thereafter, on October 6th, 1911, a Citation was duly issued herein, which is hereto annexed and is in the words and figures following, to wit:

32 In the District Court of the United States, District of Montana.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
JOSEPH PRONOVOST, Defendant.

Citation on Writ of Error.

UNITED STATES OF AMERICA, *ss:*

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at the United States Supreme Court to be held in the City of Washington, District of Columbia, 60 days from the date hereof pursuant to a Writ of Error filed in the Clerk's office of the District Court of the United States for the District of Montana, wherein Joseph Pronovost is plaintiff in error and you, the said United States of America, are Defendant in error, to show cause if any there be, why the Judgment in said Writ of Error mentioned, should not be correct- and speedy justice done to the parties in that behalf.

Witness, the Honorable Carl Rasch, United States District Judge for the District of Montana, this 6th day of October, A. D. 1911.

CARL RASCH,
United States District Judge
for the District of Montana.

Due and personal service of the foregoing citation made and admitted and receipt of copy acknowledged this 7th day of October, 1911.

J. W. FREEMAN,
United States District Attorney, and
Attorney for Plaintiff.

33 [Endorsed:] Original. No. 1749. In the District Court of the United States of America, District of Montana. The United States of America, Plaintiff vs. Joseph Pronovost, Defendant. Citation on Writ of Error. M. D. Baldwin, Attorney, Kelispell, F. D. Lingenfelter, of Counsel. Filed and Entered Oct. 7, 1911. Geo. W. Sproule, Clerk.

34 *Clerk's Certificate to Transcript of Record.*

UNITED STATES OF AMERICA,
District of Montana, ss:

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the Supreme Court of the United States, that the foregoing volume, consisting of 34 pages, numbered consecutively from 1 to

34, is a full, true and correct transcript of the judgment roll and all proceedings had in said cause, and of the whole thereof, as appears from the original records and files of said court in my possession as such Clerk; and I do further certify and return that I have annexed to said transcript and included within said paging the original writ of error and citation issued in said cause with admission of service thereof.

I further certify that the costs of the transcript of record amount to the sum of Twenty-five and 85/100 Dollars ($25.85) and have been paid by the plaintiff in error.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said United States District Court for the District of Montana, at Helena, Montana, this 10th day of October, A. D. 1911.

[Seal United States District Court District of Montana, 1890.]

GEO. W. SPROULE, *Clerk.*

Endorsed on cover: File No. 22,936. Montana D. C. U. S. Term No. 128. Joseph Pronovost, plaintiff in error, vs. The United States. Filed November 14th, 1911. File No. 22,936.

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

JOSEPH PRONOVOST, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 128.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

BRIEF FOR THE UNITED STATES.

STATEMENT.

On July 14, 1911, the plaintiff in error, Pronovost, was convicted of having on January 2, 1911, introduced intoxicating liquor into the Flathead Indian Reservation, in the district of Montana. A judgment of fine and imprisonment was imposed against him (R., 4–5). He has sued out this writ of error direct to the district court, thereby inviting inquiry solely into the jurisdiction of the court. The indictment contained three counts, one relating to whisky, a second to wine, and the third to beer. Otherwise they were all alike. After charging that he introduced intoxicants into the Flathead Indian Reservation, which was averred to be Indian country and

then in charge of an agent (R., 1–2), the record recites that the Government rested after examining a single witness; that defendants submitted no evidence, but moved for a directed verdict and to dismiss the indictment on the Government's proof, and later moved in arrest of judgment, all for alleged lack of jurisdiction. (R., 3.)

The bill of exceptions contains the following recital and none other concerning the evidence and admission of the defendant with regard thereto; that is to say—

> That thereupon *plaintiff introduced evidence* in *support* of the *charges contained in said indictment* and the *defendant admitted*, through his counsel, F. D. Lingenfelter, Esq., *that he introduced and had liquors* in his possession, *as charged in the indictment*, and that the plaintiff consented that the three counts be considered as one act. (R., 6.)

The ground of the motion for verdict and for dismissal was—

> * * * that the town site of Polson and the town of Polson is an incorporated city under the laws of the State of Montana and is subject to the police power of the state of Montana, and that the United States was and is without jurisdiction over the subject matter or the person of the defendant. (R., 6.)

The record has no further reference to the town of Polson than that above given, save in assignment of errors No. 3 and 4. (R., 8.) There was no evidence that Polson was an incorporated town;

no evidence as to the state of the title to the town site or any of its lots; and, finally, no evidence that the liquor was introduced into Polson either *alone* or *at all*. On the contrary, the bill of exceptions shows that by evidence the Government supported the charges of the indictment, and the defendant further admitted that he introduced the liquor as charged in the indictment, thereby admitting necessarily that he introduced it into the Flathead Indian Reservation and into Indian country.

ARGUMENT.

Upon this record we submit:

1. The jurisdictional question assigned, viz, was Polson a part of the Flathead Indian Reservation, or Indian country, can not be considered upon this record; and

2. Had the record presented the question, it must have been answered in the affirmative.

POINT 1.

STATE OF THE RECORD.

To have presented the question the record should have shown that the liquor was introduced *into* the town of *Polson* and *not elsewhere*, and that all the transactions made the subject of the indictment occurred there and nowhere else; that the town of Polson was incorporated before January 2, 1911; and that the lot or lots upon which the liquor was brought had been either entered or purchased by occupants, or sold at public outcry or afterwards entered

and purchased at private sale, all before the last-named date. An examination of the transcript of record in the case of *Dick* v. *United States* (208 U. S., 351) will disclose that the corresponding facts in that case were all proven on the trial, and appeared in the record in the form of detailed evidence. Such proof is not only wholly lacking here, but the defendant expressly admitted, and the Government proved, that the place of introduction was at some point on the Flathead Indian Reservation and in the Indian country. Upon this express admission and proof, had there been a further recital (though there was none) that the liquor had been in Pronovost's possession in Polson, this court would be required to assume, if necessary to uphold the judgment, that it had *also* been taken to some other point which was on the reservation and in Indian country. When the record affirmatively shows jurisdiction, as it here does, the question is foreclosed *because it must be decided from the record.* "But the record does not *show that* any notes were taken, and *there is nothing* for the *exception to rest on.*"

Agnew v. *United States* (165 U. S., 36, 45).
See also *C. H. Nichols Lumber Co.* v. *Franson* (203 U. S., 278).
Goodenough Mfg. Co. v. *Rhode Island Co.* (151 U. S., 635).
Railroad Co. v. *Rock* (4 Wall., 177).
Mulbury v. *Ohio* (24 How., U. S., 413.)
Miller v. *Nichols* (4 Wheat., 310).

The state of this record, therefore, would have warranted a motion under rule 6.

The second assignment of error (R., 8) that "the said indictment did not state facts sufficient to constitute a public offense" is intended merely to support the jurisdictional point. Were it otherwise, it is without merit if this court could consider it on this writ of error. The indictment fully meets every requirement of the statute under which it was drawn (act approved Jan. 30, 1897; 29 Stat., 506) and contained every element in the Dick case, supra, together with additional averments. Moreover, the record in the objection to jurisdiction as first made referred to "lack of jurisdiction *of the offense charged in the indictment.*" (R., 3.)

Point 2.

The status of Bolson.

We assume now, for argument's sake merely, that proper evidence appeared in the record to present the question.

By article 2 of the treaty of July 16, 1855 (12 Stat., 975-976), there was carved out, and reserved for these Indians an "Indian reservation" with defined boundaries, and article 6 of the same treaty provided a general scheme for allotment. The act of Congress of February 22, 1889, providing for the admission of Montana (25 Stat., 676), in subdivision 2 of section 4, declared that the people of the new State should disclaim all right and title to the unappropriated public lands and all lands then owned or held by any Indian or Indian tribe, and that—

> * * * until the title thereto shall have been extinguished by the United States the

> same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States * * *.

and this condition was reaffirmed as a compact by the people of Montana in Ordinance No. 1, accompanying their State constitution. (Rev. Codes of Mont., 1907, p. cxlv.)

While the reservation stood in this condition and by act approved April 23, 1904 (33 Stat., 302), but without any purchase or contemporaneous treaty of cession from the Indians, Congress passed an act—

> * * * For the survey and allotment of lands now embraced within the limits * * * of the reservation, and for—
>
> * * * the sale and disposition of all surplus lands after allotment * * *

whereby, after appropriate provisions for allotment in severalty, it outlined a scheme for the classification and appraisal of all unallotted lands and for throwing them open to—

> * * * settlement and entry under the general provisions of the homestead, mineral, and town-site laws * * *

(save as to timber lands and school sections), upon proclamation of the President, with ultimate provision for auction sale of lands remaining undisposed of at the end of five years after the approval of the act. The proceeds of all sales were to be used for the benefit

of the Indians. It may be here noted that the act refers to "the reservation" repeatedly in connection with periods of time *subsequent* to the making of the proposed allotments, and even *subsequent* to the sale of the undisposed land, and the final section, 16 (33 Stat., 305–306), declares:

> That *nothing* in *this act contained* shall in any manner *bind* the United States *to purchase any portion* of the land herein described, except sections sixteen and thirty-six, or the equivalent, in each township, and the reserved tracts mentioned in section twelve, *or to dispose of said land* except as provided herein, *or to guarantee to find purchasers for said lands* or any portion thereof, *it being the intention of this act that the United States shall act as trustee for said Indians to dispose of said lands* and to expend and pay over the proceeds received from the sale thereof *only as received*.

A reservation for religious uses, provided by an amendment to the above act, approved March 3, 1905 (33 Stat., 1081), need not be noticed, save to say that as the reservation was limited to an occupancy period, at the end of such period the title would necessarily revert to *the tribe*, as such.

By later amendment, approved June 24, 1906 (34 Stat., 354), the Secretary of the Interior was—

> * * * authorized and directed to reserve and set aside for town-site purposes, and to survey, lay out, and plat into town lots, streets, alleys, and parks * * * not less

> than eighty acres at the present settlements of St. Ignatius and Polson.

and it was provided that—

> * * * such town sites shall be surveyed, appraised, and *disposed of as provided* in section twenty-three hundred and eighty-one of the United States Revised Statutes. * * *

with proper accompanying provision for defining and granting preferential rights to actual occupants of lots.

Section 2381, supra, provides for the survey, appraisal, and disposal at public outcry, after which all unsold lots become subject to private entry, all under the direction of the Secretary of the Interior. A final amendment, approved March 3, 1909 (35 Stat., 795) adds a further section to be known as "21," which reads:

> That the lands allotted, those retained or reserved, and the *surplus lands sold or otherwise disposed of shall be subject for a period of twenty-five years to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country;* and that the Indian allottees, whether under the care of an Indian agent or not, shall for a like period be subject to all the laws of the United States prohibiting the sale or other disposition of intoxicants to Indians.

It will be noted that the amendment of March 3, 1909, supra, is as to every material feature, word for word, like article 7 of the treaty in the Dick case (208

U. S., 345). Therefore, because that treaty provision in the Dick case was declared valid by this court, the only question remaining for consideration here is, Was the Indian title extinguished prior to the passage of the act of March 3, 1909?

The act of April 23, 1904, declares that after allotment surplus lands shall be classified and appraised and thereafter "*shall be disposed of*" etc. This language of itself and alone clearly negatives the idea of a grant in praesenti. There could not be at passage of the act any identification of the grantee. Far from being the grantee itself, the Government is expressly constituted merely a trustee for the Indians to dispose of their title and apply the proceeds to their benefit. It was not known what particular tracts or lots would be subject to disposal, or what their value (which was to be the basis of sale) would be. These things could not be determined until an indefinite date in the future, and had the act been enacted without section 16 or any equivalent language it could not be given effect to transfer or in any manner extinguish Indian title as of its own date. But especially when considered in connection with section 16 it becomes plain that its effect was merely to provide a means whereby the surplus lands might be disposed of to the public, the title remaining in the Indians till the actual allotment or patenting of the lands.

We note that there was no cession or relinquishment by treaty or otherwise from the Indians to the

Government in the case of these unallotted lands, and, therefore, what title the Indians had therein at the time of the passage of the act of April 23, 1904, supra, necessarily remained in them in 1909 unless it had been extinguished by the passage, or under the operation of the first-named act. In this connection we remember that the United States, in section 16, the closing section of the act of 1904, expressly disclaimed any purpose of purchasing from the Indians other than the school sections and certain reserved tracts for agency uses, and expressly refused to guarantee to find purchasers, and declared the intention of the act to be simply that the United States should act as trustee for the Indians in the disposition of their lands and in the accounting for the proceeds received from the sale thereof *only as received;* and the introductory clause of the last-named section, "That nothing in this act contained shall in any manner bind the United States, * * *," etc., necessarily controlled the whole act, including all amendments thereto and all operations provided for thereby.

It would seem to be beyond argument that the Indian title could not be extinguished under the operation of that act or its amendments until the trustee should have passed the title to third persons, as there could not be a trustee without a beneficiary; so also the latter must have a beneficial interest in the land as long as the trust endured. This would be so had the trust been created by treaty or by

direct consent of the Indians. Especially must it be so where, as here, it is done by the act of Congress without any express assent from the Indians. And it is probably for this reason that there were no restrictions as to liquor declared in the original act of April, 1904. As no title of the Indians was divested by the mere passage of the act the restrictive provisions would have been then unnecessary. Undoubtedly the object of the amendatory provision of 1909 was to continue the protection for 25 years after title as to part of the lands might have been divested.

Moreover, it is clear for another reason that all the Indian title could not have been extinguished at the date of the passage of the liquor-restriction act of 1909, because the latter act was approved on March 3, 1909, whereas the original act it amended was approved on April 23, 1904, so that less than five years intervened and the later act was enacted before the expiration of the five years when first, under the terms of the original act, the unallotted and unentered lands were to be sold at public outcry.

For like reason the mere reservation of the 80 acres for town-site purposes, in connection with the trust created by the act, did not of itself divest or transfer the title of the Indians. As to the town site, also by force of section 16 of the original act, the United States was acting as a mere trustee, and not until there had been surveys, appraisal, and either purchase or entry by an initial occupant, or

purchase at public outcry, or at later private entry, could the Indian title have passed or been extinguished.

This conclusion is enforced when we compare the language of section 16 of the act of 1904 with the language affecting the disposition of the town site found in the amendment of June 24, 1906; the former declaring that the United States "shall act as trustee for said Indians to dispose of said lands," the latter declaring (after provision for reservation and survey and platting) "such town site shall be surveyed, appraised, and disposed of as provided in section 2381." Thus it will be seen that by the terms of the act trusteeship continues until the lands are disposed of, and that neither reservation, survey, nor appraisal constitutes a disposition of the lands but each and all are mere steps preliminary to disposing of them; and therefore, as to the town site the trusteeship necessarily endures until the final disposition of title by the trustee, which in this case is the issuance of patent from the General Land Office.

> * * * the restrictions upon alienation contained in the act of 1887 were not instantly removed by the act of 1905, but remained in force as to this allotment until the Secretary of the Interior in the exercise of the authority conferred by the latter act terminated the trust period by issuing the final patent passing the fee. (*Monson v. Simonson*, No. 14, October term, 1913, decided Dec. 1, 1913; see also *United States* v. *Gardner*, 189 Fed., 690.)

Were it the duty of the court to take judicial notice of the issuance by the Interior Department of patents for town lots in the town of Polson, the General Land Office records disclose not only that the first patent issued for any lot was issued after the passage of the liquor-restriction amendment of March 3, 1909, but also that the survey of the town site was not approved until five days thereafter. That that amendment would, therefore, apply to the lots within the town site of Polson, and that the District Court would have the jurisdiction had the evidence disclosed the transactions to have taken place there, and there only, is determined by the following decisions of this court:

United States v. *43 Gallons of Whiskey* (93 U. S., 194–5).

Dick v. *United States* (208 U. S., 345).

United States v. *Sutton* (215 U. S., 296).

Tiger v. *W. Investment Co.* (221 U. S., 312).

CONCLUSION.

It is submitted that the court below was right in taking jurisdiction and that the judgment should be affirmed.

WILLIAM WALLACE, Jr.,
Assistant Attorney General.

JANUARY, 1914.

○

ing liquor into the Indian country, are stated in the opinion.

Mr. Assistant Attorney General Wallace for the United States.

No brief filed by plaintiff in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This was a criminal prosecution for introducing intoxicating liquors into the Indian country. Upon the trial, the jury found the defendant guilty, and a judgment of conviction followed, to reverse which he sued out this direct writ of error. No brief or argument has been submitted in his behalf, and the grounds upon which he seeks a reversal are not made clear.

It appears that the jurisdiction of the District Court was challenged upon some ground, not disclosed in the record, and that the objection was overruled. The indictment is in the usual form, gives January 2, 1911, as the date of the offense, describes the liquors as consisting of designated quantities of whiskey, wine and beer, and charges that they were introduced by the defendant into the Flathead Indian Reservation, in the State of Montana, the same "then and there being an Indian country." A brief bill of exceptions recites that the Government produced evidence in support of the charge and that the defendant admitted the introduction of the liquors "as charged in the indictment." Nothing more appears respecting what was shown at the trial.

An act of Congress of January 30, 1897, makes the introduction of liquors, such as whiskey, wine and beer, into the Indian country an offense against the United States, and prescribes its punishment. 29 Stat. 506, c. 109.

This act embraces Indian country within the limits of a State. *Hallowell* v. *United States*, 221 U. S. 317; *United States* v. *Wright*, 229 U. S. 226, 237. An Indian reservation is Indian country (*Clairmont* v. *United States*, 225 U. S. 551), and we take judicial notice that on the date named there was an Indian reservation in the State of Montana known as the Flathead Indian Reservation. Treaty of July 16, 1855, 12 Stat. 975, Art. II; Acts, April 23, 1904, 33 Stat. 302, 304, c. 1495, § 12; March 3, 1905, 33 Stat. 1048, 1080, c. 1479, § 9; Rep. Com. Ind. Affairs, 1911, p. 83. Subject to exceptions not here material, the jurisdiction of the District Court, as prescribed by law, embraced all offenses against the United States committed within the State of Montana. Rev. Stat., § 563; act of February 22, 1889, c. 180, § 21, 25 Stat. 676, 682.

Thus we see, not only that the grounds upon which the court's jurisdiction was challenged are not disclosed by the record, but also that, so far as appears, the offense charged in the indictment and shown at the trial was manifestly cognizable in the District Court.

The bill of exceptions contains a further recital that the defendant, at the conclusion of the evidence, requested the court to direct a verdict of acquittal upon the ground that the town of Polson was incorporated under the laws of Montana and subject to the State's police power, and that the subject-matter of the case was not within the control of the United States. In this there may have been an indirect assertion that the liquors were introduced into the town of Polson, not into the Flathead Indian Reservation, and that the offense, if any, was not one against the United States. But, even if so, the assertion has no other support in the record. The indictment makes no mention of the town of Polson, and neither does the recital respecting what was shown at the trial. The latter, as we have seen, states that the Government pro-

PRONOVOST *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

No. 128. Submitted January 15, 1914.—Decided February 24, 1914.

Under the act of January 30, 1897, 29 Stat. 506, it is an offense against the United States to introduce liquor into the Indian country, and this act embraces Indian country within a State.

An Indian reservation is Indian country, and this court takes judicial notice of the existence at a specified time of a reservation established by treaty and statute.

With exceptions immaterial here, the jurisdiction of the District Court of the United States, as prescribed by law, embraces all offenses against the United States committed within the district.

THE facts, which involve the jurisdiction of the District Court of a criminal prosecution for introducing intoxicat-

duced evidence in support of the charge and that the defendant admitted the introduction of the liquors "as charged in the indictment." The natural import of this is that the liquors were introduced into the Flathead Indian Reservation. In this situation the reference to the town of Polson cannot be regarded as a factor in the case. But, as bearing upon the possible status of the lands occupied by the town, see *Perrin* v. *United States*, *ante*, p. 478; Act of June 21, 1906, c. 3504, § 17, 34 Stat. 325, 354; Act of March 3, 1909, c. 263, § 21, 35 Stat. 781, 795.

As no real question of the District Court's jurisdiction is involved, nor any constitutional or treaty question, there is no basis for the direct writ of error. The Judicial Code, § 238.

Writ of error dismissed.